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No. 44 and No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY ET AL., APPELLANTS,

v.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY ET AL., APPELLEES

BRIEF FOR INTERSTATE COMMERCE COMMISSION

E. M. REIDY,
For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

OCTOBER, 1930.

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No. 44

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY Company et al., appellants

v.

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---

No. 45

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants

v.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY Company et al., appellees

---

APPEAL AND CROSS APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

OPINIONS

The specially constituted District Court (Circuit Judge Gardner and District Judges Reeves and Otis) filed its written opinion on November 19,

1929 (R. 1318) which is reported in 36 Fed. (2d) 789, under the title: *The Beaumont, Sour Lake & Western Ry. Co. et al.* v. *United States.*

The reports of the Interstate Commerce Commission, hereinafter called the Commission, appear as Docket No. 15234, *In the Matter of Divisions of Freight Rates in Western and Mountain-Pacific Territories,* 148 I. C. C. 457; (R. 55–93) (December 10, 1928) and 156 I. C. C. 94; (June 10, 1929). (R. 93–109.)

JURISDICTION

The suit was commenced on July 22, 1929, under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219; U. S. C. Title 28, Sec. 47), to annul and set aside a certain order of the Commission, dated June 10, 1929, prescribing just, reasonable, and equitable divisions of joint rates applying on traffic between points in the so-called Southwestern[1] and Western Trunk-Line[2] territories, and of rates applying on traffic between points in Southwestern territory and Eastern territory but passing through Western Trunk-Line territory.

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[1] Southwestern territory was defined by order dated September 8, 1925, as consisting of the states of Texas, Arkansas, Oklahoma, Louisiana west of the Mississippi River, and Missouri south of the main line of the Misosuri Pacific Railroad between Kansas City and St. Louis. (R. 1173.)

[2] By the same order, Western Trunk-Line territory was defined as including the states of Iowa, Minnesota, Wisconsin, Illinois, North Dakota, South Dakota, Missouri on and north of the main line of the Missouri Pacific Railroad between Kansas City and St. Louis, and the upper peninsula of Michigan. (R. 1173.)

The final decree, denying the injunction, dismissing the petition, and upholding the validity of said order of the Commission, was entered November 27, 1929. (R. 121.) On November 29, 1929, the District Court granted a stay order, pending appeal (R. 136–8), and from this action the Government and the Commission noted a cross-appeal, which was allowed on December 23, 1929 (R. 143).

Pursuant to Rule 12 of this court, appellants on March 7, 1930, submitted a statement as to jurisdiction, and on April 28, 1930, the court found that probable jurisdiction had been shown.

QUESTION

Is the suspended order of June 10, 1929 (R. 109), which prescribes the basis for fixing divisions of joint rates applying on traffic between points in Southwestern and Western Trunk-Line territories, and of joint rates applying on traffic between points in Southwestern and Eastern territories, but passing through Western Trunk-Line territory, beyond the authority of the Commission, without evidence to support it, or arbitrary in any respect?

THE STATUTE

This proceeding was instituted by the Commission pursuant to the duties imposed upon it by Section 15 (6) of the Interstate Commerce Act, which provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Com-

mission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

STATEMENT

Proceedings before the Commission

Proceedings before the Commission arose out of an order entered by it, dated October 8, 1923 (R.

49), upon its own motion, instituting an investigation for the purpose of determining whether the divisions of freight rates and charges in Western and Mountain-Pacific territories are, and for the future will be, unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the various carriers made respondents in the proceeding, 52 in number. By additional orders the Commission permitted other carriers, including the St. Louis Southwestern Railway Company, to be made respondents. (R. 1174.) During the course of the hearings, an agreement was reached by the interested parties with respect to divisions of joint rates between points in Western Trunk-Line territory and points in Pacific-Coast territory. Because of this, the investigation of the Commission was limited for the time being to divisions in the aggregate north and south of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale, and Thebes, Ill., respectively, of joint rates between points in Southwestern and Western Trunk-Line territories, and of joint rates applying on traffic between points in Southwestern and Eastern territories, but passing through Western Trunk-Line territory. (R. 57.) These divisions are the only ones involved in the order attacked in this suit.

The Commission conducted extensive hearings in the territories mentioned, at which much testimony was submitted and other evidence in the form of exhibits introduced and briefs were filed by the respective carriers through their counsel. By

their testimony, the western trunk lines endeavored to show that they were entitled to increases in their divisions, and the southwestern lines sought to hold what they had. (148 I. C. C. 457–8.) (R. 57.) The lines referred to as the western trunk lines, 12 in number, are set forth in a footnote on page 458 of the report (R. 57–8), while the southwestern lines, 35 in number, are named on page 459 (R. 58). After the hearings mentioned, and in accordance with its established practice in such cases, an examiner of the Commission issued a proposed report recommending that the Commission find the divisions in the aggregate north and south of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale, and Thebes, Ill., respectively, of joint rates on freight traffic in general between points in Western Trunk-Line territory and points in the southwest, to be not unreasonable, inequitable, or otherwise unlawful. Exceptions to this report were filed by the western trunk lines and an answer to these exceptions was filed by the southwestern lines. Oral argument was then had before the entire Commission. Its decision (148 I. C. C. 457–483) (R. 55–93) was different from that proposed by its examiner, as shown by the following findings:

> After consideration of all the facts of record, therefore, we find that in the case of the joint rates applying on freight traffic via the gateways of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale, and Thebes, Ill., between points in the Southwest, as de-

fined in this proceeding, and points in the States of Illinois and Wisconsin, subject to the exceptions noted below, the just, reasonable and equitable divisions in the aggregate, south and north of said gateways, will for the future be determined by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul north of the gateway to be 80 per cent of the first-class rate for that distance under the same scale. We also find that in the case of the joint rates applying on freight traffic via the gateways named above between points in the Southwest, as defined in this proceeding, and points in the remainder of western trunk-line territory, as defined in this proceeding, subject to the exceptions noted below, the just, reasonable and equitable divisions in the aggregate, south and north of said gateways, will for the future be determined by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul north of the gateway to be 87 per cent of the first-class rate for that distance under the same scale. We further find that in the case of joint rates applying on freight traffic via the gateways

named above, between points in the Southwest, as defined in this proceeding, and points in the territory east of the Illinois-Indiana State line and on and north of the Ohio River and the line formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian between Cincinnati, Ohio, and Norfolk, Va., subject to the exceptions noted below, the just, reasonable, and equitable divisions of the shares accruing to the western lines will for the future be determined by dividing said shares in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul of the western trunk lines north of the gateway to be 80 per cent of the first-class rate for that distance under the same scale, minus 10 cents. Where differentials are used in the construction of the joint rates, such differentials should be deducted before prorating and added to the divisions accruing to the carriers in the regions where they apply. There are excepted from the above finding divisions of joint rates to and from points in western Louisiana within the switching limits of New Orleans and also divisions of joint rates applying via Kansas City to and from points in Oklahoma on the Santa Fe, the Rock Island, and the Missouri Pacific which were included within the agreement as to trans-Missouri divisions which is described in the first part of this report.

> Instead of applying the basic prorate formulas described in the above findings to individual joint rates and routes, both territories may be divided into groups and percentages determined for the division of all joint rates between particular groups by applying the appropriate prorate formula to fair average distances between such groups and the gateways named in the findings. In view of the desirability, for purposes of simplicity and convenience, of the use of such groups in working out the readjustment of the divisions, no order will for the present be entered, but respondents will be given 60 days from the date of service of this report to agree upon an adjustment substantially in accord with the above findings. Full reports should be made to us at the end of this period, indicating what negotiations have been had in this connection and what the results have been. (R. 88–90.)

On March 8, 1929 the southwestern lines presented a petition for rehearing, reargument, and reconsideration consisting of 145 pages of argument,[3] and in addition appendices and Exhibits. On March 25, 1929, the western trunk lines, by answer duly filed, opposed the granting of the petition for rehearing. On June 10, 1929, the Commission issued a report on reconsideration, 156 I. C. C. 94

[3] The petition mentioned has not been printed in the record, but it was stipulated by all parties that it should be sent to this court as an original exhibit, to which all parties might refer in brief or argument. (R. 1219.)

(R. 93–108), in which the following statement was made:

> * * * After careful study of this petition and of the answer filed by the western trunk line respondents, we have denied rehearing and reargument, but have reopened the proceedings for reconsideration in order that our previous findings may be modified in certain particulars. The issues are so important, however, and they raise so many relatively new and difficult questions that we shall depart from our usual practice and explain, in this report, not only the reasons for the modifications, but also why rehearing and reargument have been denied. (R. 94.)

The Commission then proceeded, in its report on reconsideration, to take up individually and comment upon the more important points made by the southwestern lines, and the court is respectfully referred to the report of June 10, 1929, and also to the original report, to show how painstaking the Commission has been in considering the questions in issue. It is believed that these reports in themselves constitute a complete and effective answer to the contentions now before the court. In the report on reconsideration (R. 93) the Commission did, however, make certain modifications of its previous findings in favor of the southwestern lines. It increased from 10 cents to 15 cents the factor to be deducted from the western trunk lines' proportions when they acted as bridge carriers; and it also found that in case of traffic to and from points in

Illinois and Wisconsin or territory east of the Illinois-Indiana State line, ground exists for differentiating the traffic moving through the Kansas City gateway from that moving through the St. Louis, Cairo, Gale, and Thebes gateways, since the hauls of the western trunk lines on the latter traffic are wholly in the territory east of the Mississippi River, and for that reason changed the factor used in the rate prorate for hauls north of the latter gateways from 80 per cent of the southwestern scale to 75 per cent. On the same day, June 10, 1929, the Commission issued an order, the body of which reads as follows:

> *It is ordered,* That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale, and Thebes, Ill., between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points on the lines of any of the above-listed respondents in the States of Illinois and Wisconsin, the just, reasonable, and equitable divisions in the aggregate, south and north of said gateways, shall on and after August 1, 1929, be determined, subject to the provisos noted below, by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rates for the distance

covered by the haul north of the gateway to be 80 per cent, when the gateway is Kansas City, and 75 per cent when the gateway is St. Louis, East St. Louis, Cairo, Gale, or Thebes, of the first-class rate for that distance under the same scale;

It is further ordered, That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways named in the next preceding paragraph between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points on the lines of any of the above-listed respondents in the remainder of western trunk-line territory east of the Missouri River, as such territory is above defined, eliminating the States of Illinois and Wisconsin, the just, reasonable and equitable divisions in the aggregate, south and north of said gateways, shall on and after August 1, 1929, be determined, subject to the provisos noted below, by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul north of the gateway to be 87 per cent of the first-class rate for that distance under the same scale.

It is further ordered, That of the joint rates for the transportation of property in interstate or foreign commerce via the gateways named in the second preceding para-

graph between points on the lines of any of the above-listed respondents in the Southwest, as above defined, and points in the territory east of the Illinois-Indiana State line and on and north of the Ohio River and the line formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian between Cincinnati, Ohio, and Norfolk, Va.; the just, reasonable, and equitable divisions in the aggregate, south and north of said gateways, of the shares of said joint rates accruing to above-listed respondents participating therein shall be determined on and after August 1, 1929, subject to the provisos noted below, by dividing such shares in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the present southwestern scale and the assumed rate for the distance covered by the haul of western trunk-line respondents north of the gateway to be 80 per cent, when the gateway is Kansas City, and 75 per cent, when the gateway is St. Louis, East St. Louis, Cairo, Gale, or Thebes, of the first-class rate for that distance under the same scale, minus 15 cents;

Provided, however, That where differentials are used in the construction of the joint rates, such differentials shall be deducted before prorating and added to the amounts determined by the prorating process and accruing to respondents in the regions where the differentials apply: and

Provided, further, That instead of applying the basic prorate formulas prescribed in the above-ordering paragraphs to individual joint rates and routes, both territories may be divided, if respondents so agree, into groups, and percentages determined for the division of all joint rates between particular groups by applying the appropriate prorate formula to fair average distances between such groups and the gateways named above; and that respondents for purposes of convenience and simplicity may deviate in other respects from the strict letter of the order if they so agree.

It is further ordered, That the above-listed respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on and after August 1, 1929, and thereafter to abstain from asking, demanding, collecting, or receiving divisions of said joint rates upon other bases than those above prescribed. (R. 111)

By supplemental orders,[4] the effective date of the Commission's order of June 10, 1929, was extended to December 1, 1929.

Proceedings in the lower court

On July 22, 1929, the original petition was filed. Pursuant to leave of court, this was amended by petition filed September 17, 1929 (R. 14–49), pray-

[4] The order of July 25, 1929, corrected an error in the previous order by omitting the Texarkana & Fort Smith Ry., which had not been made a party. (R. 1219.)

ing that the Commission's order be set aside and annulled, and for "such other and further relief as to the Court may seem meet and proper" (R. 49).

The District Court, on final hearing, rendered a very full opinion (R. 1318–39), sustaining the validity of the action of the Commission in all respects. Its final decree dismissing the bill was entered on November 27, 1929 (R. 121), and thereafter on November 29, 1929, without notice and without hearing, the District Court stayed the operation of the Commission's order pending determination by this court (R. 136), conditioned upon the posting of a bond in the sum of $3,000,000 by the southwestern carriers (R. 137), to protect the revenues of the western trunk lines should the action of the Commission be finally sustained by this court. On January 22, 1930, after argument, the court refused to vacate the stay order. (R. 1313.)

ASSIGNMENT OF ERRORS

While separate errors are assigned to certain holdings of the District Court in its opinion (R. 123) the assignment of errors and the points relied upon, for the purposes of this argument, may be summarized as follows:

The order of the Commission is invalid because:

1. The Commission had no authority to deal with the carriers on a group basis, without considering the carriers, and their particular revenue needs and requirements, individually. (Assignment of Errors 2, 5, 7, 8, 12, and 20.)

2. The Commission's investigation into the reasonableness of the divisions applying between points in Southwestern and Western Trunk-Line territories, did not embrace *all* of the carriers operating, or cover the joint rates on *all* of the traffic moving between points, in the territories mentioned. (Assignment of Errors 6, 9, and 11.)

3. After the Commission found the southwestern lines were entitled to from 17 to 20 per cent greater revenue per ton-mile than the western trunk lines, it prescribed divisions yielding the southwestern lines only 9 per cent more revenue. (Assignment of Errors 3.)

4. The Commission prescribed a formula for the division of the joint rates in question which had never been brought to appellants' attention, and consequently, as to said formula, appellants had been denied due process of law. (Assignment of Errors 4 and 21.)

5. It is based on the relative financial condition of the carriers. (Assignment of Errors 13.)

6. It is confiscatory. (Assignment of Errors 15.)

7. There were certain irregularities in the proceedings before the Commission in that the Commission

(a) made findings and entered its order upon assumptions of fact not supported by evidence and considered matters not introduced in evidence. (Assignment of Errors 16.)

8. The cross appeal of the Commission and the Government is based upon an Assignment of Error which reads as follows:

The District Court erred in restraining enforcement of the Commission's orders of June 10, 1929, July 25, 1929, and September 24, 1929, pending appeal to and determination of the appeal by the Supreme Court of the United States. (R. 142.)

SUMMARY OF ARGUMENT

1. Most of the contentions advanced here have been disposed of adversely to appellants' contentions by the decisions of this court in *New England Divisions*, 261 U. S. 184, and in *United States et al.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274. In *New England Divisions, supra*, at p. 197, this court held that the Commission has authority to fix divisions in a comprehensive manner and without considering the carriers individually. In *United States* v. *Abilene & So. Ry. Co., supra* (hereafter referred to as the *Orient Divisions case*), this court held, and in doing so referred to *New England Divisions*, that it is not necessary to have before the Commission all of the carriers who participate in the joint rates. (Id. 282–3.)

2. The Commission's order is not based on the relative financial needs of the carriers; in any event the *Orient Divisions case* (p. 284–5) settles that the Commission may, in the public interest, take into consideration the financial needs of a weaker road.

3. The contention that the order is void because the Commission found that the southwestern lines

were entitled to from 17 to 20 per cent greater revenue per ton per mile than the western trunk lines and then prescribed divisions yielding the southwestern lines only 9 per cent more revenue, is based upon a misapprehension of what the Commission actually did. The Commission found, as shown at p. 475 of its first report (R. 83), that the cost of service, including a fair return on investment, was about 20 per cent greater in the southwest than in the western trunk-line group, based on averages of 1923 and 1924 operations, and about 17 per cent greater based on 1924 operations. But "cost of service" is by no means the equivalent of "revenue per ton per mile." The average haul of the southwestern lines is a little more than 50 per cent greater than the average haul of the western trunk lines, and *New England Divisions*, 126 I. C. C. 579, 667, recognizes that a mileage prorate is an unsatisfactory test when the hauls are short on one side and long on the other.

4. There is no merit in the appellants' contention that the order is void because confiscatory. A prescription of a basis of dividing joint rates in the future is in no sense a positive limitation upon revenue; it in no way prevents the raising of those rates, and the consequent increase of revenue, if such an increase can be justified.

5. It is contended that the order is void because the first knowledge appellants had of the basis of divisions ordered by the Commission was when its

report was served; consequently appellants had no opportunity to meet said basis by introducing testimony to show its practical workings. The appellants availed themselves of the opportunity to present all relevant evidence to the Commission, and in fact did so. The Commission's duty under the Act was to reach a conclusion as to what would constitute just, reasonable, and equitable divisions. There is no support in law for the theory that the Commission can not reach final conclusions without first reaching tentative conclusions, which is in fact the contention now being discussed.

6. There were no irregularities in the proceedings before the Commission.

(a) The contentions that the Commission went outside the record and referred to evidence not properly before it can not be sustained. By stipulation made between counsel for the parties (R. 1267) it was agreed that the Commission could refer to annual reports and other reports on file with it. Further, the significance shown in the reports mentioned were corroborative merely of conclusions therein from reports for earlier years, admittedly in the record, and were in no way essential to the Commission's findings. Appellants had objected to the Commission's using figures for what they considered "remote years" (R. 37), and now object to the Commission using figures for later years.

7. The Supreme Court should sustain the cross appeal of the Government and the Commission

because it was an improvident exercise of its discretion for the lower court, in view of the very full opinion of that court sustaining the validity of the Commission's action in all respects, to stay the operation of the Commission's order pending appeal to, and determination by, this court. The requirement of a bond in such a case is not sufficient protection to the public. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658.

ARGUMENT

1. The Commission may fix divisions in a comprehensive manner and without dealing with each carrier independently of all the rest

This proceeding was instituted by the Commission pursuant to the duties imposed upon it by Section 15 (6) of the Interstate Commerce Act. The leading decision of this court construing the authority of the Commission is *New England Divisions case,* 261 U. S. 184. It is respectfully submitted that the decision of the court in that case disposes, to a large extent, of many of the contentions advanced by appellants here. There the Commission directed that the divisions of the several New England railroads in their joint through freight rates with carriers operating west of the Hudson River be increased about 15 per cent, such increases in rates operating to reduce the aggregate amounts receivable by the carriers operating west of the Hudson River. (66 I. C. C. 196.) As stated by this court (p. 187) the Commission's order in the *New England Divisions case* was to

continue in force only until the further order of the Commission. The order herein is similarly limited. (R. 113; 115.) In that case, it was asserted, as it is asserted here, that the order is void because based upon the theory that, under Section 15 (6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually, and that Congress had not conferred such authority (p. 196). Upon this point the court said:

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them.
>
> For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes

> were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. * * * (Id. 197.)

That the Commission was justified under the law in making an order such as it made here is apparent from the decision quoted; further both groups of carriers here dealt with the case on that basis: The lower court, concerning this, said:

> It is next contended that the order is void because it is based on averages, and does not take into consideration each individual carrier either on the basis of typical evidence or specific evidence, and in this connection it is urged that to make a divisional order valid the Commission must consider whether the divisions are just and reasonable from the standpoint of each carrier which participates in the joint rate. We think this contention is completely answered by the Supreme Court in *New England Divisions Case*, 261 U. S. 184.
>
> It appears from the record that the hearings were conducted on the basis of a group proposition. No attempt was made to have the individual carriers treated separately. All witnesses purported to represent all of the Southwest carrier respondents. One of the witnesses who was in fact connected with the traffic department of the Santa Fe Railway says: "The Southwestern Lines, believing a history in so far as it is available, of the class rates * * * would be helpful in reaching a decision in this proceeding, sub-

mit the following: * * * ." Another witness connected with the traffic department of the Missouri Pacific testified: "The Southwestern Lines found it necessary to assign the testimony with respect to divisions to individual carriers, depending upon the gateways or states of the Southwest in which their line is more vitally interested. * * * My testimony will therefore include all of the interested Southwestern Lines in connection with the divisions via the several gateways and Southwestern states previously mentioned."

These are indicative of the manner in which the petitioners presented the case before the Commission. At no time during the proceedings before the Commission was any claim made that the Commission was without authority to deal with the case on a group basis. In fact, this question was not even presented to the Commission in the petition for rehearing. The suggestion that the petition filed asking the Commission to make additional Southwestern carriers parties was tantamount to an objection to the consideration of this matter on the group basis is, we think, without force. There is no claim in this petition that the Commission was without jurisdiction because it failed to name additional carriers, and the basis for the petition was that unless all the roads were made respondents, those which were respondents would have difficulty with their connections in arranging subdivisions of revenue in the event of an order by the Com-

> mission changing the divisions. Until the present action was commenced the petitioners did not indicate in any way that they objected to the handling of the case on a group basis. [The court then quoted from this court's decision in the *New England Divisions Case.*] (R. 1326–27.)

It continued:

> The Commission's order does not preclude independent Southwestern Lines from hereafter showing to the Commission any injustice that may result from its application. By its terms it is to remain in effect until the further order of the Commission. We are warranted in assuming that the order in this case is based upon evidence which the Commission assumed was typical in character and ample in quantity to justify the finding made as to each division of each rate of every carrier. It is well established that individual rates or divisions which are typical of all, afford a proper basis for a finding as to any one. The record in this case shows every essential mentioned by the Supreme Court in *New England Divisions Cases,* 261 U. S. 184, *Orient Divisions Case,* 265 U. S. 274, and *Brimstone Divisions Case,* 276 U. S. 104. (R. 1328)

2. The contention that the order of the Commission is based on the relative financial needs of the several carriers, and hence void, is without merit

In *New England Divisions case, supra,* this court stated (p. 189) that the contention was made that the order was void, because its purpose was not to

establish divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. A somewhat similar contention is made by appellants in assignment 13. (R. 129.)

This court pointed out (pp. 189–192) the fact that the Transportation Act, 1920, introduced into the federal legislation a new railroad policy, and stated that the provision concerning divisions was an integral party of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. In disposing of the contention advanced in the *New England Divisions case,* the court stated:

> * * * The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share?—It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable. Cost of the service is one of the

> elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom. (Id. 195.)

This statement is quoted only to indicate the broad power and duty of the Commission under the statutory provisions in question, because in the present case, while evidence as to the relative financial conditions of the carriers was received and given consideration, it was not, as a reading of the reports of the Commission will indicate, a factor of importance in the conclusions finally reached.

But if the fact were otherwise it would not be beyond the Commission's authority. In the *Orient Divisions Case,* this court said:

> It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system," provided the share left to its connections is "adequate to avoid a confiscatory result." *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195. (Id. 284–285.)

Allegation is also made (R. 124–5) that the action of the Commission is arbitrary and void in that it attempts to transfer revenues from less prosperous Southwestern lines to more prosperous Western lines. A reading of the Commission's first report in the *New England Divisions Case,* 62 I. C. C. 513, will show the same condition existed in that case, in that certain of the roads operating west of the Hudson River were not making as much money as certain of the New England roads. (P. 521 of 62 I. C. C.) (See also report of the Commission on reargument, 66 I. C. C. 196, based on the same record as its first decision, and dissent of Commissioner Hall, p. 209.) This court sustained the Commission's order. By Section 15 (6) the Commission is authorized to fix the just, reasonable, and equitable divisions of joint rates, and it was this power that it here exercised after full hearing of all the interested parties and a thorough consideration of the evidence submitted.

In upholding the order of the Commission, the lower court, in its opinion, said, on this point:

> A general charge that the proceeding was so arbitrary and contrary to the purposes of the Interstate Commerce Act as to be a denial of due process of law is argued by counsel, and in support of this contention it is urged that the order transfers revenue from less prosperous to more prosperous carriers. This has already been discussed and we think is controlled by the *New England Divisions case.* The Western Trunk Line

carriers were found by the Commission to be in worse financial condition than the Southwestern Lines, and this finding is not challenged. The order only incidentally affects the revenues of the companies involved and was not entered for the primary purpose of assisting one group of carriers over another group of carriers, but to correct an inequitable and unreasonable division found to exist. Whether or not this order was ill-advised, or whether it will produce a systematic basis of divisions is not for this Court to determine, but was a matter committed by the statute to the judgment of the Commission. In our opinion, the order can not properly be held to be arbitrary, but is based upon evidence upon which the judgment of the Commission might properly be exercised. (R. 1331.)

3. The claim that the order is void because, after finding that the southwestern lines were entitled to from 17 to 20 per cent greater revenue per ton per mile than the western trunk lines, the Commission prescribed divisions yielding the southwestern lines only 9 per cent greater revenue, is without merit and based on a misapprehension of what the Commission did

Decisions of this court abundantly show that it is not its duty under the law to review the Commission's findings of fact, but, aside from this, it will be well to analyze the claim that the Commission found that the southwestern lines are entitled to an average of 17 to 20 per cent greater revenue per ton per mile of freight transported than the western trunk lines and then prescribed divisions which

yielded the southwestern lines only 9 per cent greater revenue. (R. 32.)

The "9 per cent" mentioned in this connection is arrived at from appellants' traffic test of September, 1928, which was introduced in evidence as Exhibit 10 before the lower court. (R. 1226.) Whether or not the Commission's order was correctly applied in making this test could only be determined by a careful examintion of the underlying work sheets. For present purposes, however, it will be assumed that it was correctly applied.

The claim that the Commission found that the "Southwestern respondents are entitled to an average of 17 or 20 per cent greater revenue per ton per mile of freight transported than are the Western Trunk Line respondents" is not correct. What the Commission actually found, on page 475 of its first report, was that the—

> cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent greater in the Southwest than in the western trunk-line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent greater based on 1924 operations. (R. 83.)

"Cost of service" is by no means the equivalent of "revenue per ton per mile." It is a universal rule that revenue per ton per mile, even upon a single commodity over the same railroad, varies with the length of haul, and for very good reasons.

Cost of service is made up of two elements. Cost of terminal operations is one element, and it is constant, regardless of the length of haul. The other element is the cost of the line haul, which varies with distance. The combination of these two elements, one constant and the other variable, of course produces a total cost per ton per mile, which likewise varies with distance, but not in direct ratio.

Exhibit 10 shows that in September, 1928, the traffic of respondent roads affected by the Commission's order amounted to 462,467 tons and that the total ton-miles were 145,081,066 for the western trunk lines and 218,264,036 for the southwestern lines. (R. 1226.) Dividing tons into ton-miles, the average haul was 313.7 miles for the former and 471.9 miles for the latter. The average haul of the southwestern lines was, therefore, a little more than 50 per cent greater than the average haul of the western trunk lines. Assuming the same cost of service in both territories, the cost per ton per mile on this particular traffic for the southwestern lines would clearly be materially less than the corresponding cost for the western trunk lines, because of the longer haul over which to spread the constant terminal cost. This is elemental in the consideration of railroad cost of service. Under the circumstances, divisions based on relative costs of service which would yield the southwestern lines on this traffic the same revenue per ton per mile for their longer hauls as the western trunk lines receive for

their shorter hauls, would indicate materially higher cost of service in the Southwest than in Western Trunk-Line Territory. And following out this line of reasoning, divisions which would yield the southwestern lines on this traffic 9 per cent more revenue per ton per mile than the western trunk lines, the result shown for the Commission's divisions by appellants' own traffic test, would reflect a cost of service in the Southwest higher than that in Western Trunk-Line Territory by much more than 9 per cent.

This general subject was considered by the Commission in the first report in this case, at page 463, as follows:

> Stated differently, under the existing divisional bases and judged by a mileage prorate, a mile in southwestern territory is worth on the average from 129 to 135 per cent of a mile in western trunk-line territory. Nor does this fully indicate the relative advantage of the southwestern lines, for a mileage prorate is by no means a perfect method of dividing joint rates, even where transportation and other conditions do not differ materially. It results in the same ton-mile revenue for each participating carrier, regardless of the length of haul and of the principle that, other things being equal, ton-mile yields should decrease as distance increases. *New England Divisions,* 126 I. C. C. 579, 667. It is for this reason that rate prorates or block-mileage plans are often

> used in preference or that provision is made for minimum divisions of not less than 25 per cent, or some similar percentage. (R. 64.)

The discussion of the same subject in *New England Divisions,* cited in the above quotation, was as follows:

> A mileage prorate is an unsatisfactory test when the hauls are short on one side and long on the other. Throughout this proceeding both complainants and defendants have seemed to lose sight of the significance of relative lengths of haul, especially when referring to ton-mile yields. Such yields are continually compared in the briefs with no mention of the lengths of haul, without which the comparisons are meaningless. An apt illustration is afforded by the earnings of the Central Vermont on this bituminous traffic. Because its ton-mile yields are very largely in excess of those of defendants, and because its receipts are a much larger percentage of the total revenue than its haul is of the total distance, it seems to be assumed by defendants that its divisions must be generous. As a matter of fact a terminal line with so short an average haul as the Central Vermont could not sustain the burden of the terminal expense without relatively high ton-mile earnings. This is universally recognized in the construction of rate scales and in the principle, followed in those scales, that ton-mile yields should decrease with distance. There is no good reason why the same principle should not apply

to divisions, and it is because of this fact that a rate prorate, when the rates are fairly comparable, affords a valuable test of divisions.

This point was fully covered in the opinion of the lower court, from which we quote:

> It is next urged that the Commission's order should be set aside because the amount of revenue which will accrue to petitioners will not be as much as 17 to 20 per cent greater revenue per ton per mile than the revenue accruing to the Western Trunk Lines, but will be not more than 9 per cent greater, whereas the Commission found that in 1924 it cost about 15% more per ton mile to transport freight in the southwest than in the Western Trunk Line territory. Evidence other than that offered before the Commission was offered and received in this Court in support of this contention.
>
> In support of this contention counsel have stressed one or two statements found in the opinion of the Commission. Attention is called to the fact that the Commission has determined the relative cost of service as a vital thing to be ascertained, and that the cost is approximated within certain limits so far as ascertainable. These two elements are then selected as the test and the only test for the basis of the order and it is contended that because the order does not in practical operation produce with mathematical accuracy the results anticipated by the Commission it should be set aside. It should be observed in this connection that in this attack all other factors or elements are not only

subordinated but eliminated and disregarded. While the relative cost of service in the two groups was a vital thing to be ascertained, it does not follow that the solution of the Commission's problem was dependent entirely, and only on this determination. Vital as this factor may have been, it does not follow that the result of the Commission's order should, in disregard of every other factor, mathematically produce a result which reflects the difference in the cost of service in the two groups The Commission itself, on petition for rehearing, considered this question and in the second report it is said: "There are other matters to be considered such as the efficiency with which the carriers concerned are operated and the importance to the public of the transportation service of such carriers, but all of these we took into consideration in summarizing the pertinent evidence. * * * We realized that the statistics were open to criticism in certain respects and resolved doubts in favor of the carriers whose revenues would be reduced by our finding, i. e., the Southwestern lines. The final result was not the product of statistics alone but was reached in the exercise of judgment after considering all of the pertinent evidence." The finding of the Commission as to the relative cost of service was simply an approximation and purported only to be such, and the Commission's report does not indicate that the difference in the cost of service should be reflected in the distribution of revenue.

Counsel contend that the Commission found that "The Southwestern respondents are entitled to an average of 17 or 20 per cent greater revenue per ton mile of freight transported than are the Western Trunk Line respondents." This is not warranted by the actual finding of the Commission which is that "Cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent greater in the Southwest than in the Western Trunk line group, based on averages of 1923–1924 operations, and somewhere in the neighborhood of 17 per cent greater based on 1924 operations."

Cost of service is not analogous to revenue per ton mile. Revenue per ton mile varies of necessity with the length of haul, and the cost of service is made up of the cost of terminal operations, which is substantially the same regardless of the length of haul and the cost of line haul which varies materially with the length of haul. The combination of these factors produces the cost per ton mile, which varies with the length of haul, but not in direct ratio. Counsel are relying upon the so-called September, 1928, test. In passing it may be observed that this test may or may not have been typical. The time covered was confessedly short and there are many factors going into the compilation of the exhibit which purports to reflect the result of the operations for the period mentioned.

It is, however, observed that the average length of haul of the Southwestern lines, as reflected by this test, was a little more than 50 per cent greater than the average length of haul on the Western lines. If we may assume the same cost of service in both territories, still the cost per ton mile on traffic for the Southwestern lines would be materially less than the corresponding cost for the Western Trunk lines for the reason that there is a longer average haul in the Southwestern territory. Divisions based on cost of service would therefore yield the Southwestern lines the same revenue per ton mile for the longer hauls as the Western Trunk lines received for their shorter hauls, and hence, divisions which would yield the Southwestern lines on this traffic 9 per cent more revenue per ton mile than the Western Trunk lines, the result claimed under the test would reflect a cost of service in the Southwest higher than that in the Western Trunk line territory by much more than 9 per cent.

It seems clear that a formula using the cost per ton mile would, under the circumstances, produce a result unfair to the Western Trunk lines because of the shorter average haul on these lines.

It is apparent that the Commission had this matter in mind. In its report it is said, " Stated differently, under the existing divisional bases and judged by a mileage prorate, a mile in southwestern territory is worth on the average from 129 to 135 per cent

of a mile in Western Trunk Line territory. Nor does this fully indicate the relative advantage of the southwestern lines, for a mileage prorate is *by no means a perfect method of dividing joint rates,* even where transportation and other conditions do not differ materially. It results in the same ton-mile revenue for each participating carrier, *regardless of the length of haul and of the principle that, other things being equal, ton-mile yields should decrease as distance increases.*

Bearing in mind that the showing reflecting the test of September, 1928, is prepared on the ton-mile basis, it would seem pertinent to observe what the Interstate Commerce Commission of the United States says on this question in *New England Divisions case,* 126 I. C. C. 579, 667:

"A mileage prorate is an unsatisfactory test when the hauls are short on one side and long on the other. Throughout this proceeding both complainants and defendants have seemed to lose sight of the significance of relative lengths of haul, especially when referring to ton-mile yields. Such yields are continually compared in the briefs with no mention of the lengths of haul, without which the comparisons are meaningless."

The Commission was not permitted to base its decision as to divisions of joint revenue upon any one thing, either cost of service, necessity, density of traffic, or any other single fact or element. The statutes required the Commission to give due consider-

> ation to all factors, and the Commission's report shows affirmatively that it has done so in this case. As was said by the Supreme Court in the *Louisville & Nashville Case,* 227 U. S. 188, "For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended."
>
> We are clear that the validity of the order cannot be made to depend alone upon a division of revenue which would exactly reflect the approximate division in cost of service. (R. 1322–25.)

4. The order is not void as confiscatory

With reference to appellants' contention that the divisions which were prescribed are confiscatory, it is sufficient to say that a prescription of a basis of dividing joint rates in the future is in no sense a positive limitation upon revenue. It provides that existing joint rates, whatever they may be, shall be divided in certain proportions. It in no way prevents the raising of those rates, and hence the increasing of revenue, if such an increase can be justified. Not only that, but Section 15a of the Interstate Commerce Act imposes upon the Commission itself the following duty:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

> tories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

Manifestly the order with respect to divisions in this case in no way hinders or impedes the Commission in the performance of its duty under this provision of Section 15a.

In *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, there was an allegation made, similar to the one made here, that rates ordered established by the Kentucky Railroad Commission would operate to confiscate the carrier's property. In overruling it, this court said:

> Without passing upon the general propositions advanced in argument, it suffices to say that we are of the opinion that the bill as amended wholly failed to make a case entitling the appellant to the relief sought. Apart from the merely general averments, it is alleged that the rates fixed by the order would cause an annual loss in revenue on intrastate freight of at least $15,600, and also that, in consequence of the effect on interstate rates, there would be an additional annual loss of not less than $3,000; further, that if the carrier were compelled to put in

> similar rates to the thirty-two other distillery stations, there would be a loss of $54,000 a year on shipments to those places; and that there would be other losses to an amount not specified, on shipments to consignees other than distillers.
>
> But it may be supposed that, other conditions being the same, a reduction in rates found to be excessive will cause a loss in revenue; and the question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. The bill does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed. (Id. 315.)

This point was presented to the lower court and overruled by it in the following language:

> There is a suggestion that the order of the Commission is confiscatory as to the petitioners. This question does not seem to have been urged before the Commission, and the purpose of the order is not to take from one set of carriers revenue and transfer it upon another. The most that can be claimed as to the evidence on this point is that it shows that certain of the railroads earn less than five and three-quarters per cent upon their total investment. This is not a sufficient basis for assailing the order in question, *N. P. R. R. Co.* v. *Dept. of Public Works,* 268 U. S. 39. There is no showing that the reduction in their share of revenue arising from traffic moving between

the Western Trunk Line territory and the Southwestern territory will operate in any way to confiscate petitioner's property. (R. 1332.)

5. The Commission was not under the duty of advising appellants in advance of its order of the basis of divisions proposed by it

It is alleged by appellants (R. 132) that the first knowledge they had of the basis of divisions ordered by the Commission was when its report was served, and that consequently they had no opportunity to meet the said basis by the introduction of testimony to show its practical workings or otherwise; hence the order is void.

Appellants, as well as the western trunk-line respondents, had full opportunity to present to the Commission all of the data and other evidence that they deemed pertinent in determining the just, reasonable, and equitable divisions of the joint rates in question. They availed themselves of this opportunity, and a voluminous record was built up for the consideration of the Commission. Both sides stated their conclusions of record as to what the divisions should be. It was the duty of the Commission not to choose between these conclusions but to reach its own conclusions upon the evidence submitted.

That this in fact is what the Commission did will be shown by an examination of its two reports. In its second report the Commission said:

> * * * It was not our purpose to compromise between the claims of the two groups of carriers, but to establish a basis of divisions in line with the evidence, whatever the revenue results might prove to be. It is true that we thought we were giving the western trunk lines less than they sought, and the test indicates that this supposition was correct; but this was a wholly incidental result. That the new basis might in some instances give more than a mileage prorate was recognized. * * * (R. 94–5.)

The divisions in question were in urgent need of revision. In its first report, 148 I. C. C. 457, at p. 459 (R. 58), the Commission said:

> Complainants and defendants alike admit that the divisions in question conform to no systematic and consistent plan, but they are not particularly interested in the revision of individual divisions. What complainants seek and defendants oppose is primarily a finding that the former are entitled to substantially increased revenue in the aggregate out of the traffic under consideration, and a fixation of divisions appropriate to that end.
>
> The present divisional bases are so numerous and vary so widely that an attempt to describe them would unduly extend this report and serve no useful purpose. They are shown of record in great detail. There are so-called merchandise divisions, applying on traffic in general, and various special divisions for a number of commodities, of which lumber and oil are by far the most impor-

tant. By oil we mean petroleum and its products. Most of the bases were established during the period from 1892 to 1896, inclusive, but the divisions on oil from Oklahoma via Kansas City are the result of arbitration as late as 1916. The bases generally apply between large groups of points. Just how they were arrived at is not disclosed and probably is not now known. No doubt they were the result of bargain and trade and plainly they are not definitely related to any of the criteria which we must consider in determining just, reasonable, and equitable divisions.

And at p. 464, the following appears:

As has been stated, most of the present divisional bases were established more than 30 years ago. Assuming that they were just and reasonable when first established, complainants undertake to show that relative conditions have since that time changed very materially, to the great advantage of defendants. The latter, on the other hand, undertake to show that conditions are still much less favorable in the Southwest than in western trunk-line territory, and that this difference amply justifies the divisions which they now receive.

The proposed report of the examiner contained the following statement, to which no exceptions were filed:

During the last 30 years both western trunk-line territory and the Southwest have enjoyed a substantial increase in population, but the increase in the Southwest has been

> somewhat greater than in western trunk-line territory. Railroad mileage also has substantially increased in both territories, but the increase in the Southwest has been particularly pronounced. As an agricultural region the Southwest has had a growth that has far surpassed that of western trunk-line territory. The development of the oil business in the Southwest is of outstanding importance and has no counterpart in western trunk-line territory. Industrial growth, however, has been of less consequence in the Southwest than in western trunk-line territory. These changed conditions have operated to change materially the relative positions of the two groups of carriers to the advantage of those serving the Southwest. (R. 65–6.)

The theory of this contention seems to be that the Commission could not lawfully reach final conclusions without first reaching tentative conclusions and reopening the case for further hearing. No support in law for this theory has been or can be given. If it were sound, it would apply in rate cases as well as division cases and would be wholly destructive of orderly and expeditious procedure before the Commission. Appellants not only had full opportunity in the first instance to present to the Commission all pertinent evidence upon the matters at issue, but after the decision they had opportunity to present a petition for rehearing or reconsideration together with the reasons therefor. Such a petition was presented and, as the report

on reconsideration shows, it was considered with the utmost care by the Commission and led to certain modifications of its original conclusions.

The fact that all the contentions advanced by appellants in their petition for reconsideration were not adopted by the Commission is not a reason for holding invalid its order. As said by the Supreme Court in the *Virginian Ry. Case*, 272 U. S. 658, 668:

> * * * The argument urged in this connection is appropriate for consideration by the Commission, and has presumably been duly considered by it. The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary, or otherwise illegal.

The Commission has explained in its report that it used the Southwestern scale merely as a mechanism for dividing the joint rates in the proportions which it found justified by the facts of record, and why it deemed this scale most appropriate for that purpose. The Commission said:

> Incidentally it is suggested in the petition that a prorate based on first-class rates can not appropriately be used for traffic the bulk of which does not move on class rates but largely on commodity rates. As has already been explained, our rate-prorate formula was adopted as a mechanism for dividing the joint rates in the proportions which we found justified by the facts of record. In our opinion it is an appropriate mechanism

> for that purpose. The southwestern scale now forms the basis within the Southwest and also interterritorially, not only for class rates but also for many commodity rates. The proceeding has to do with the divisions in the aggregate north and south of the gateways between the two groups of carriers. It is impracticable to deal with such aggregate divisions except upon the basis of average conditions, and the case was so tried by both groups. No carrier sought special treatment for itself, nor was any effort made to show that special division bases are required by the transportation conditions surrounding particular kinds of traffic. (R. 98.)

The lower court said, in this connection:

> The decision was not bottomed upon the southwest scale, but it is the contention of the petitioners that the Commission had no authority to use the scale even as a mechanical device or method for dividing the rates in the proportion warranted by the facts, without first notifying the Southwestern Lines of their intention so to do. This suggestion is entirely without merit. (R. 1333)

6. There were no irregularities in the proceedings before the Commission

(*a*) In the *Orient Divisions Case, supra,* this court annulled an order of the Commission and condemned the use of Annual Reports which the Commission had considered in evidence, but which had not been introduced, saying:

> * * * The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. (Id. 287.)

In Assignment of Errors 16 (R. 130–1) appellants are here attempting to bring the action of the Commission in this case within the condemnation of the *Orient Case.* We believe the attempt should fail. In the *Orient Case,* this court said:

> The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties. (Id. 289.)

One subdivision of this Assignment (R. 130) alleges that the first-class southwestern scale, prescribed in *Consolidated Southwestern cases,* 123 I. C. C. 203, was not introduced in evidence. The Commission could, of course, take cognizance of a scale of rates prescribed by it in another case, and it is difficult to see how any rights of appellants were prejudiced thereby, as all of them were parties in the *Consolidated Southwestern cases* and have established and put in force the rates found reasonable by the Commission in that case.

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On page 97 of the report on reconsideration the Commission said:

> Incidentally it is suggested in the petition that in the use of our rate prorate formula of assumed rates in western trunk-line territory we went outside of the record in disregard of *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, inasmuch as these assumed rates were not introduced in evidence. This suggestion carries the doctrine of the case cited to absurd lengths. The southwestern scale was in evidence, and the assumed scales were percentages thereof used merely as parts of the mechanism for dividing the joint rates in the proportions warranted by the facts of record. (R. 97.)

The statement in the passage quoted, to the effect that the "southwestern scale was in evidence," was not strictly accurate. In substance, however, it reflected the situation. In the examiner's proposed report (R. 1185) the scale prescribed in the *Consolidated Southwestern cases* was set forth in some detail (R. 1195). Not only was no exception taken to the proposed report by the southwestern lines on that account, but the fact that this scale was so set forth was mentioned in oral argument by counsel for those lines without criticism, express or implied. (R. 1287.) The transcript of the oral argument before the Commission is in the record. (R. 1247.) But even if this were not the situation, it is submitted that the Commission may properly and lawfully take cognizance in its decisions of rate scales which it has itself prescribed

in other cases and which are in effect as a result of its orders. And, as indicated above, this is particularly true where the same carriers are or were parties in both proceedings.

Further, as explained by Witness Reed, representing the southwestern lines, in the proceedings before the Commission:

> The basic scale used in the Southwest is the Memphis-Southwestern scale 55 I. C. C. 515 and applies between points in Southern Missouri, Arkansas and Louisiana west of the Mississippi River. (R. 789.)

The scale prescribed by the Commission in 1927 in the *Consolidated Southwestern Cases* was but a modification and extension of the scale introduced by the witness last mentioned.

The claim made in subdivision (c) of Assignment 16 (R. 130) that the Commission did not have before it evidence showing the cost of operation, taxes, etc., on respondents' lines confined to that portion of Western Trunk-Line Territory involved in the divisions proceeding, has been clearly answered by the lower court's decision herein, from which we quote:

> It is next urged that the Commission did not have before it evidence showing the cost of operation on respondents' lines confined to the Western Trunk Line territory. This argument is not based upon the assumption that the Commission went outside of the record, but that the evidence in the record did not justify the conclusion reached by

the Commission. The statistics presented by both groups of carriers were system figures which includes the investment and results of operation upon these lines outside of those territories. This was unavoidable and a segregation was found to be impracticable. The point is referred to by the Commission in its second report in the following language:

"Reverting to the criticisms in the petition, we were compelled to use system statistics because the carriers were unable to segregate the interchange traffic and show the respective costs of service for that alone and no offer of such segregated costs is made in the present petition. Moreover, these system figures were voluntarily presented by both groups of carriers as pertinent and important evidence. We were also obliged to use system statistics which spread over into other territories, because of the difficulty of obtaining representative statistics closely confined to the two groups. The Western Trunk Lines did attempt such a segregation and we use the results as shown above as one of the checks upon our conclusions but the Southwestern Lines objected to these figures as not sufficiently representative."

Again the Commission, in its second report, says:

"We realized that the statistics were open to criticism in certain respects and resolved doubts in favor of the carriers whose revenues would be reduced by our findings, i. e., the Southwestern Lines. The final result

was not a product of the statistics alone, but was reached after considering all of the pertinent evidence."

It is thus observed that the petitioners offered these statistics in evidence and the conclusion of the Commission is not confined to such evidence. The fact that the statistics cover systems might go to the weight of the testimony but not to its admissibility. (R. 1333–4.)

In Assignment of Error 16 (d) (R. 130–1) it is alleged that the Commission referred to and considered the average operating revenues, expenses, and average hauls of the Northern Pacific and other roads, without these figures being introduced in evidence. In this connection it is submitted that one statement of the Commission can not be detached from the rest. The entire passage shows that certainly the southwestern lines were liberally treated by the Commission which, as it stated, "resolved doubts in their favor." (R. 105.) Quoting from page 104 of the report on reconsideration the Commission said:

The southwestern lines now object to this statement upon the ground that we assumed without evidence that conditions are more favorable in official territory than in western trunk-line territory, and that the operations of the Illinois Central in the Mississippi Valley are conducted under more favorable conditions than its operations in western trunk-line territory. Yet they now ask us to assume, without proffer of definite evi-

dence, that conditions in far western territory are much less favorable than in western trunk-line territory. Merely as an indication that there may be doubt as to this assumption, we have extracted from the annual reports for 1924 the following statistics for roads which operate wholly or largely in far western territory:

Carrier	Per ton-mile		
	Operating revenue	Operating expenses	Average haul
	Mills	*Mills*	*Miles*
Great Northern	10.64	6.69	255.5
Northern Pacific	11.21	7.69	272.9
Western Pacific	9.53	7.51	374.2
Union Pacific	11.67	7.20	393.3

In the same year the averages which we found in our prior report for the western trunk-line group, including the Rock Island and the Santa Fe, were 11.29 mills per ton mile for operating revenue, 8.38 mills for operating expense, and 221 miles for average haul. Excluding these carriers, they were 10.78 and 8.07 mills and 204 miles, respectively. We are not convinced from what has been presented that inclusion in the group statistics of certain operations in far western territory materially distorted the comparison to the disadvantage of the southwestern lines. Moreover, as above indicated, we resolved doubts in their favor, and our final conclusions were not dependent upon these statistics alone. And while the petition criticizes the statistics which were used, it makes no clear and definite offer of better

> evidence. In fact, throughout the petition the criticism is destructive rather than constructive. (R. 105–6.)

It is clear from the reports that no reliance whatever was placed upon these statistics of far western carriers in the decision of the case. They were cited merely as an indication that the assumption in the petition for rehearing filed by the southwestern lines on March 1, 1929, that transportation conditions in far western territory are much less favorable than in Western Trunk-Line Territory, might be without foundation. In that petition the Commission was, in effect, asked to accept that assumption without specification or proffer of any evidence definite or indefinite, which the southwestern lines proposed to introduce in support thereof.

As pointed out by the lower court in its opinion, the use of these figures in the second report of the Commission did not affect the merits of the Commission's order; its decision had already been made with respect to the divisions involved in this case. (R. 1335.) The court said:

> It is charged that the Commission went outside of the record in that it gave consideration to certain statistics of the Great Northern, Northern Pacific, Western Pacific and Union Pacific railroads. Reference to these statistics is made in the second report of the Commission and they were referred to in response to charges made in the petition for rehearing to the effect that the operations

of the Western Trunk Lines in territory west of the Western Trunk Line territory were not carried on under as favorable conditions as were these operations in the Western Trunk Line territory. The use of the figures in the second report does not affect the merits of the Commission's order. The decision had already been made with respect to the divisions involved in this case.

The second report discussed the petition for rehearing and the grounds for denying same, but it modified its first report with respect to overhead traffic handling. These modifications were in no manner affected by the statistics quoted from the Great Northern, Northern Pacific, Western Pacific and Union Pacific roads. The Orient Divisions case relied upon by petitioners condemned the use of evidence necessary to establish the essential facts, when such evidence had not been properly introduced, but the statistics here referred to were not so used. (R. 1334.)

Concerning the allegation (R. 129) that the Commission's order is unlawful and void because the Commission did not have before it all the necessary and proper parties, to wit: the railroads operating in the territory east of the Illinois-Indiana State line and connecting with the Western Trunk Line respondents at junctions in the State of Illinois, it is sufficient to point out, as the lower court has done, that the order does not purport to affect the revenue accruing to the eastern lines, and it was not necessary that they be made parties.

In holding the contention now being discussed to be without merit, the lower court said:

> The contention that the order is vulnerable because it prescribes the division of joint rates on traffic to and from points east of the Indiana-Illinois state line is based upon a misapprehension. The order provides that the shares of joint rates on the overhead traffic shall be determined in accordance with the formula prescribed by the Commission. The oral evidence taken in this court is to the effect that these rates divide on the Mississippi river and the revenue accruing to the carriers east of the river is eastern revenue and the revenue accruing to the carriers west of the river is western revenue, and that the roads receiving it are known as western carriers. In its first report the Commission held that on the overhead traffic in question the shares accruing to the western lines should be determined on a formula which the Commission prescribed. The order, particularly in connection with the oral testimony offered, is not uncertain, it does not purport to affect the revenue accruing to the so-called eastern lines, and hence it was not necessary that the eastern lines should have been made parties to the proceeding. There is no merit in this contention. (R. 1337.)

In subdivision (e) of Assignment of Error 16, the criticism is that the Commission considered operating conditions in other territories without evidence thereon being introduced. (R. 131.) This

claim was made in the petition for rehearing and was discussed by the Commission in its report on rehearing, pages 103–104. (R. 104–5.) In its first report the Commission had said:

> * * * In the first place, while both groups contain systems which extend beyond their western boundaries into territory with less favorable operating conditions, the western trunk-line group also contains systems, such as the Wabash and Illinois Central, which extend beyond its eastern boundary into official territory with its more favorable operating conditions and, in the case of the Illinois Central, into the Mississippi Valley portion of southern territory. * * * (R. 83.)

In its second report, in referring to the statement just quoted, the Commission said:

> The Southwestern lines now object to this statement upon the ground that we assumed without evidence that conditions are more favorable in official territory than in Western Trunk Line territory and that the operations of the Illinois Central in the Mississippi Valley are conducted under more favorable conditions than its operations in Western Trunk Line territory. (R. 105.)

The matter was correctly disposed of in the opinion of the lower court, from which we quote:

> It is also claimed that the Commission went outside of the record in assuming that operating conditions upon certain parts of the Wabash and Illinois Central Railroads lying without Western Trunk Line territory were

more favorable than operating conditions in Western Trunk Line territory. The matter is referred to by the Commission in its second report in the following words: "The Southwestern lines now object to this statement upon the ground that we assumed without evidence that conditions are more favorable in official territory than in Western Trunk Line territory and that the operations of the Illinois Central in the Mississippi Valley are conducted under more favorable conditions than its operations in Western Trunk Line territory." The first report made no such reference but did say that the Wabash extended beyond the eastern boundary of the Western Trunk Line territory into official territory with its more favorable operating conditions. The Wabash is shown to be an eastern line. In the *Orient Divisions Case* it is said: "The parts of the annual report in question were used as evidence of facts upon which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice." Manifestly the Commission's reference to those operating conditions was in the nature of a criticism on the cost figures presented to the Commission, but notwithstanding this criticism, the figures were accepted. There was no necessity of any proof with respect to the operating conditions on the Wabash Railway in official territory, and the statement complained of did not constitute a finding and the decision is not dependent upon any such alleged assumption as to these operating conditions. (R. 1335.)

In subdivision (f) of Assignment 16 it is alleged that the Commission considered traffic densities in 1927 within the Western Trunk-Line and Southwestern territories, segregated by states, although that data was not introduced in evidence. (R. 131.) This allegation is answered on page 100 of the report on reconsideration, where the Commission said:

> It is alleged that we went outside of the record in our consideration of traffic densities in 1927, and that the stipulation that we might consider information on file with the commission related to annual reports only.
>
> *Comment.*—The data referred to are incorporated in special reports now secured annually by our Bureau of Statistics. We believe that the stipulation was broad enough to cover these reports. However, this evidence was merely corroborative of conclusions drawn from other evidence which is admittedly of record, and the 1927 showing was in no way essential to our findings. Moreover, there is no allegation in the petition that these 1927 figures were inaccurate. (R. 101.)

Appellants' contention on this point is that the stipulation referred to was that the "Annual Reports" for 1926 and 1927 could be considered in evidence and that such "Annual Reports," as that term is universally understood, do not include traffic densities segregated by states. When the discussion before the Commission leading up to this

stipulation is considered in its entirety, as of course it must be, it leaves no doubt, we submit, that it is broad enough to include these special reports filed with the Commission. At the oral argument before the Commission (which has been included in the record here) the following appears:

> Mr. TOWNER: * * * I did not want to talk about density, however, because I have an offer to make with respect to that: the Examiner has followed and used the State density figures. Perhaps he is right. I do not think he is. I favor the method of using the density of the lines of respondent but the point is that the figures apply to all carriers, but the State figures should be taken. He has found the density in Western Trunk Line territory is greater than in Southwestern and by a substantial percentage, including Illinois. He concludes with respect to that point, however, by finding that in the near future [if] the present ratio increase of density in Southwestern territory continues the density will be on a parity. The last figures put in the record were for individual lines as of 1925. There were no State figures available at the time the hearing was closed for 1925 and there were none for 1926. I was uncertain of the propriety of doing it, but I put in my exceptions the statement of figures of 1925 and of 1926 density and added to it a statement; I intended to ask the Commission if I might submit those figures. They are standard and I did it so that I could give my adversaries notice of

what I intended to do. We have prepared figures—Mr. Parsons who prepared them is prepared to answer any questions that may be asked with respect to them. The figures were gotten up by a Bureau to which my opponent belongs as well as my own line, and inasmuch as it related to such important matter I thought the Commission might desire to make it part of the record and, while I do not understand it is proper to submit this in argument, I have the figures and I assume that Mr. Outlaw and Mr. Muckley will have no objection. I put the statement regarding them in the exceptions for that reason.

Mr. MUCKLEY: I will continue any objection that I have to additional evidence for 1926 alone unless we have the evidence similarly for 1927. I do not want the record to show any particular change of one year. If we open the case we should look into all the conditions, such as the consideration of the flood catastrophes of the Southwest and I would like that considered.

Mr. TOWNER: We would have been glad to put in the 1927 figures but I was advised that they were not available.

Commissioner MEYER: We will give consideration to these suggestions. For the present, please, proceed with the argument.

Commissioner EASTMAN: Can the parties agree that the Commission can refer to reports on file filed by the various carriers up to date instead of depending on the old records?

Mr. TOWNER: As far as I am concerned I am willing to make that stipulation that the annual reports of all the lines may be referred to by the Commission for such information as it wishes to get from them.

Commissioner MEYER: Do you agree to that, Mr. Outlaw?

Mr. OUTLAW: It places me in an embarrassing position. Of course when you refer to these matters often use is made of them and they are used in such a manner that, without explanation, they might be susceptible of different interpretations. When you can explain the use to be made of them and what interpretation is to be made of the statements, it is a different matter. Therefore I dislike to do it but as long as the Commission asks for it I will agree to that.

CommissionerMEYER: Such reference may be made to them?

Mr. OUTLAW: Under the circumstances, yes. (R. 1265–7.)

The Commission has stated that traffic densities by states in 1927 were obtained by special reports secured from the carriers by its Bureau of Statistics. (R. 101.) It is submitted that these reports come within the meaning of the stipulation. But assuming that they are not to be so regarded, the fact remains that similar statistics obtained from the same source for the years 1922, 1923, and 1924 are of record and were submitted by the southwestern lines themselves. Nor is it alleged that the 1927 statistics referred to by the Commission

in its report are in any way inaccurate. Furthermore, as stated in the passage quoted above, this evidence was merely corroborative of conclusions drawn from other evidence which is admittedly of record, and was in no way essential to the conclusions reached.

In its opinion on this point, the lower court said:

> The contention that the density figures for 1927 referred to by the Commission in its first report were not in the record does not seem to be warranted by the record. The report of the Commission shows that "Upon the argument it was stipulated that we might refer in the decision of the case to reports on file with us which had been received since the close of the hearings. Such reports make it possible to compare traffic densities for 1927 computed in the same way as those shown above for 1924."
>
> In the Commission's second report it is said: "The data referred to are incorporated in special reports now secured annually by our Bureau of Statistics. We believe that the stipulattion was broad enough to cover these reports." Without further reference to the record, it seems sufficient to say that these records were properly before the Commission. (R. 1336.)

The last contention urged under this assignment is that the Commission did not have evidence before it showing operating expenses, taxes, etc., and a fair return on investment as regards the transportation service performed upon the traffic trans-

ported under the joint rates involved in the proceeding before the Commission. (R. 131.) This in effect is an attack upon the Commission's order because it dealt with the Western Trunk Line and Southwestern lines on a group basis, a proposition already discussed in this brief. (*Ante*, pp. 20–24.)

In its first report, p. 473 (R. 78), the Commission showed the average freight operating expenses per ton-mile in 1924 of Class I carriers operating in the Western Trunk line and Southwestern groups, such average operating expenses being shown by including, in one instance, and excluding, in another instance, the Santa Fe and Rock Island (carriers having important mileages in both groups). These average operating expenses (freight) were further shown with respect to strictly western trunk lines and strictly southwestern lines, and, as the Commission said:

> these figures indicate that it cost somewhere in the neighborhood of 15 per cent more per ton-mile to haul freight in the Southwest than in western trunk-line territory. (R. 78.)

The Commission then pointed out that:

> Operating expense, however, does not tell the whole story, for there are overhead charges to consider, such as taxes and return or investment, and it is with respect to such overhead that the carriers with the heavier traffic density have the advantage. Average freight revenues per ton-mile are from this

> point of view better criteria, and we have seen that they were somewhere in the neighborhood of 25 per cent higher in the Southwest than in western trunk-line territory. But such revenues in turn may be partially misleading, for they may have provided a larger return on investment in the one case than in the other. A still better basis for comparison would obviously be the amounts needed in each case to cover operating expenses, taxes and other like charges, and a fair return on investment. (R. 78.)

The Commission then showed the book investment (which included Road and equipment, materials and supplies, and cash), the net railway operating income and the percentage of return for all carriers in the two groups, including in one case and excluding in another the Santa Fe and Rock Island lines. (R. 80.) These figures were taken from an exhibit introduced by the Southwestern lines, consisting of 56 pages, which is incorporated in this transcript. (R. 512.) At p. 476 (R. 84) the Commission set out the relative financial conditions of the two groups of carriers for 7 different years, and which showed net railway operating incomes stated in percentages of aggregate book investments. The amount of revenue required by each respondent before the Commission to pay operating expenses, taxes, and a fair return on its property held for and used in the service of transportation was shown in considerable detail in Exhibits A–124 and A–241, which are printed in the record.

These statements also show the rates of return earned by the carriers for several years up to the close of the hearings before the Commission.

The usual general allegations are made that the order of the Commission is unsupported by the evidence; it is of course established by decisions of this court that an order of the Interstate Commerce Commission, if unsupported by evidence, is void. The following cases so hold:

> *Interstate Comm. Comm.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 90–2.
>
> *Chicago, R. I. & P. Ry. Co.* v. *U. S.*, 274 U. S. 29, 33–4.
>
> *New England Divisions case*, 261 U. S., 184, 203.
>
> *Florida East Coast Ry.* v. *U. S.*, 234 U. S. 167.

Therefore, in view of the allegations of appellants of lack of evidence, the record before the Commission must be examined to the extent of determining whether it does or does not contain substantial evidence in support of the order. It is unnecessary, however, to go further in such examination. *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, states:

> In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie*

> true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Ill. Cent.* v. *I. C. C.* 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final, not that its decision, involving as it does so many and such vast public interests, can be supported by a scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order. (Ibid., 547.)

See also *Interstate Commerce Commission* v. *Ill. Cent. R. R.*, 215 U. S. 452, 470; *New England Divisions Case*, 261 U. S. 184, 204; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Western Chemical Co.* v. *United States*, 271 U. S. 268; 270–271; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298, and cases therein cited.

The evidence dealing with the situation in the Southwest as compared with western trunk-line territory covers many pages of the record (R. 159–1169), and over 250 exhibits, all of which were introduced before the lower court. Obviously, in a brief it is not possible to do more than summarize such evidence, and this, in fact, is what the Commission has done at pages 477–78 (R. 85) of its report of December 10, 1928 (148 I. C. C.), where it said:

> * * * Summarizing the evidence, so far as salient facts are concerned, it is shown:

1. That the present divisions were established, for the most part, about 35 years ago and conform to no logical or consistent basis. They are considerably more favorable to complainants in the case of oil and lumber than in the case of other forms of traffic.

2. That transportation conditions have changed materially since most of the divisions were established, and that the change has benefited defendants more than it has complainants. The trend is distinctly in favor of defendants.

3. That transportation conditions are nevertheless more favorable in western trunk-line territory than in the Southwest, more particularly with reference to density of traffic. However, conditions vary in the different parts of western trunk-line territory, and appear on this record to be considerably more favorable in Illinois than in the other States included in that region. They grow continually less favorable from east to west.

4. That the difference in transportation conditions is reflected in the level of rates in the two territories. It is not possible from the record to determine just what the difference is in average levels, but it appears to be greater than the difference in average transportation conditions. This is particularly true of the class rates which have apparently been constructed upon somewhat different theories in the two territories, and are in process of revision in western trunk-line territory.

5. That the cost of operation per ton-mile, including all expenses, charges, and a fair return on investment, in all probability does not average as much as 20 per cent higher in the southwestern than in the western trunk-line group.

6. That the financial condition of complainants is not on the whole as good as that of defendants. (R. 85–6.)

With the full record before it the lower court reviewed the evidence and said:

All of the tariffs in effect at the time of the hearing were stipulated into the record before the Commission. The divisions contained in these sheets to the rates carried in the tariffs as made in the case of individual shippers, were shown in detail, and evidence of this character was offered both by the representatives of the Western Trunk Lines and representatives of the Southwestern Lines.

It is to be noted that these documents so offered in evidence covered all car load traffic moving in June and October, 1924, over respondent's lines between Western Trunk Line territory and Southwestern territory and showed the total revenue, junction, originating and delivery line, commodity, origin, destination, weight, haul north and south of the junction, revenue as divided, revenue per carrier mile, tons hauled one mile, and similar statistical information. With respect to each respondent carrier these statements not only showed typi-

cal examples of each division of each rate of every carrier, but showed an actual cross-section of actual traffic moving in the two average months of 1924. In fact, it appears that the statements in evidence were of the same character as the September, 1928, test put in the record before this Court as Exhibit 10, on which the petitioners relied as adequately showing exactly what will happen under the new division prescribed by the Commission's order.

The record is replete with statistical information and statements showing rates and divisions applicable to individual commodities shipped in volume between the two territories. Much of this evidence is reflected in Exhibit I filed in this Court by petitioners. Of the 289 exhibits offered in evidence before the Commission, great numbers of them reflect the very details mentioned in the decisions relied upon by petitioners.

We think it clear that the Commission assumed that the record was ample in quantity and substantially typical to justify the order entered as to each of the carriers, and as before noted, the case would seem to be ruled by the *New England Divisions Case, supra,* and we think all other contentions of counsel with reference to this question are met and answered by the decision in the New England case and no good purpose would be served by a further consideration of the subject. (R. 1328–9.)

Section 15 (6) requires the Commission to consider, among other things, the importance to the public of the transportation services of the carriers involved. Objection is made that this requirement of the statute has not been met; we submit, very respectfully, that figures quoted in the opinion of the lower court, all of which were taken from the record before it, and the reasoning of the court on this point, dispose of the objection. The court said:

> It is urged that there was no testimony before the Commission with regard to the importance to the public of the transportation services of each of respondents, and hence the order cannot be sustained, and that the order is not in the public interest. Paragraph 6 of Section 16 [15] of the Interstate Commerce Act provides that the Commission shall give due consideration, among other things, to " The importance to the public of the transportation services of such carriers." The question of public interest would not be susceptible of direct proof but must be gathered from all the facts and circumstances, and is made up of many factors. The statements and exhibits put in evidence before the Commission would seem to reflect every aspect of the commercial importance of the transportation involved in the hearing. These exhibits include a series of maps showing the lines of the various roads, together with divisional groups in the two territories. A casual glance at these maps shows that practically all of the railroad

mileage in the central section of the United States is operated by the carriers participating in the hearing. The exhibits show the vast amount of freight handled between the two territories. It appears that in the year 1925 the Western Trunk Line respondents operated over 48,000 miles of railroad and the Southwestern lines operated nearly 49,000 miles of railroad. That the property investment of the Western Trunk Lines was $3,432,475,212 and the property investment of the Southwestern line respondents was $3,403,862,855. That during 1925, the public paid the Western Trunk Lines $867,887,503 for transportation services performed, and likewise paid the Southwestern Lines $863,-242,535 for transportation services performed. This is also shown for the three previous years. These lines furnished the railroad transportation in a region comprising nearly one-third of the area of the United States.

It would seem inevitably to follow from this testimony that the railroad transportation service involved was of the utmost public importance and would not require the direct testimony of any witness to this fact. It is a conclusion based upon the facts appearing in this record that can not be escaped.

The Commission in its opinion says that it had taken into consideration all the circumstances mentioned by the statute so far as the record made it possible so to do. The public being interested in the transportation service involved and the efficiency thereof,

it may be assumed that the Commission, in making its order, had in mind that the public interest would be served, and this conclusion, whether wise or imprudent, is based upon evidence in the record and cannot be reviewed by this Court. The Commission found that the divisions were not just, reasonable nor equitable, and having so found, it was authorized under paragraph 6 of Section 15 of the Interstate Commerce Act, on public hearing to change the divisions so as to cure the injustice, unreasonableness and inequality found to exist. The Commission attempted at least by this order to cure this unlawful condition and such a change would certainly be in the public interest. The mere incidental fact that some of the Southwestern lines making a lesser rate of return than some of the Western Trunk Lines may lose money is not a controlling factor. The same contention was made in the New England Divisions case, supra, in which the Supreme Court sustained the Commission's order. (R. 1330–1.)

7. The District Court erred in restraining enforcement of the Commission's order of June 10, 1929, as amended by its orders of July 25 and September 24, 1929, pending appeal to and determination of the appeal by this court

As hereinbefore shown, notwithstanding that, on final hearing, the District Court failed to find that in making and entering the orders of June 10, 1929, July 25, 1929, and September 24, 1929, the Commission did or omitted to do any act tending to show

that the orders or that either of them is invalid, but on the contrary after a very full opinion sustained the validity of the Commission's action in all respects (R. 1318), and notwithstanding that on account of such failure it declined to grant the injunction asked for by petitioners below, the court, without notice and without hearing, restrained enforcement of the orders pending appeal to and determination of the appeal by this court. (R. 136.) As a condition to the granting of the stay pending appeal, the lower court required the execution of a "good and sufficient bond" in the sum of $3,000,000. (R. 137.) In granting a restraining order under these circumstances we think the District Court erred.

After the stay order had been in effect about two months, the court heard arguments with respect to a motion to vacate said order pending appeal, and, after argument, the motion to vacate was denied. (R. 1313.)

The lower court granted the stay pending appeal to and decision of this court for reasons stated in its order of November 29, 1929, as follows:

> 1. That novel and important questions concerning which there is serious doubt are presented by the assignment of errors filed herein which should be reviewed by the Supreme Court of the United States;
>
> 2. That on account of the financial condition of some of the respondent railroad companies in Western Trunk-Line territory

which are in receiverships, petitioners would be in danger of not being able to recover any increased divisions which they might pay to said Western Trunk-Line respondents, in the event that the decree of this court should be reversed on appeal and said order, or orders, of the Interstate Commerce Commission be adjudged to be invalid;

3. That irreparable injury may result if the Commission's said order is not stayed pending appeal;

4. That on account of the effect on the net revenues of the petitioners, and the fact that the said orders of the Interstate Commerce Commission do not apply to all the joint rates between Western Trunk-Line and Southwestern territories, which will necessarily cause confusion and necessitate a large amount of labor and expense which should not be incurred unless the validity of the said orders should be upheld on appeal;

5. That the said order of the Commission has not yet gone into effect;

6. That the status quo should be preserved pending appeal;

7. That if the said order of the Interstate Commerce Commission is stayed pending appeal the public will not suffer in any manner by reason of said stay;

8. And that the rights and interests of the said respondent railway companies in Western Trunk-Line territory can be fully and adequately protected by the execution by appellants of a good and sufficient bond. (R. 136–7.)

In the case of *Virginian Railway Company* v. *United States,* 272 U. S. 658, involving the validity of an order of the Commission requiring the carriers to cease and desist from collecting rates on coal from stations on the Virginian Railway to destinations in the West which exceed the district rates to the same destinations, this court had occasion to pass upon the jurisdiction to be exercised by a District Court in staying enforcement of a Commission order pending appeal. In the *Virginian Ry. case* this court held that the power to stay the order pending appeal was one that called for an exercise of discretion by the court who "heard the whole matter, have read the record, and can pass on the issue * * * without additional labor." The court further held that there was an abuse of such discretion in that case, and in sustaining the Government's cross-appeal with respect thereto, among other things, said:

> In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertained a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other

> special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court. (Id. 673.)

A reading of the very full opinion of the District Court (R. 1318) indicates there was " no serious doubt as to the correctness of its own decision "; nor does the decision depend upon a question of law on which there is conflict among the courts of the several circuits. Is there any special reason advanced by the lower court why the Commission's order ought not to become operative until its validity can be considered by the Supreme Court? We fail to find any in the reasons given by the lower court, summarized above (p. 73). In view of the decisions of this court in *New England Divisions, supra,* and in *Orient Divisions case, supra,* we do not believe (1) there is any novel or important question on which there is serious doubt unanswered; and (2) it would seem that the fact that several of the western trunk lines are in receivership is a very good reason why they should be permitted to get the "just" and "reasonable" divisions to which both the Commission and the lower court found them entitled. (3) "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." (*Virginian Railway case, supra,* p. 672.) Appellants do not appear to be suffering any more injury in being allowed to retain divisions the Commission found unreasonable—and its action was affirmed by the lower court—than the

appellee carriers are suffering in having such divisions withheld. (4) The "confusion," "labor," and "expense" should properly be incurred by a party bringing a suit found by the court to be without merit; just as in a case appealed to this court an appellant has considerable "labor" and "expense" in perfecting an appeal, such as reducing testimony to narrative form, assigning error, designating portions of record to be printed, etc. (5) The fact that the Commission's order has not yet gone into effect, and (6) that the court states the *status quo* pending appeal should be preserved, are too general. (7) The question of public interest would seem to be best served by the valid Commission order being put into effect, rather than the continuance of a condition found invalid by the Commission, whose action was affirmed by the court. Further, the question of "public interest" is one of the elements the Commission must consider, and has considered. (8) As said by this court in the *Virginian case*, "an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless" (p. 673).

We believe that under the facts of this case the issuance of the stay order by the District Court constituted an abuse of discretion, and that the doctrine enunicated in the *Virginian case, supra,* should be applied here. Ordinarily, it is inconsistent for a District Court to grant a stay order with

the one hand, while denying an injunction with the other.

For the reasons above set forth we respectfully submit that the appeal of the carriers in case No. 44 should be dismissed, and that the cross-appeal of the United States and the Interstate Commerce Commission in case No. 45 should be sustained.

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In behalf of the United States we concur in the argument and conclusions of Counsel for the Interstate Commerce Commission contained in this brief.

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